No. 88-1510

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IN THE

Supreme Court of the United States

October Term, 1988

MARY MARGARET WARD; DOROTHY C. WARD; JACKSON P. WARD, III; LEMUEL H. WARD; EDNA JO BRINKLEY; HORTENSE BRINKLEY; MILDRED BRINKLEY; DARGAN COLE; and JANE G. STEINERT,
Petitioners,

v.

SUCCESSION OF RICHARD W. FREEMAN; RICHARD W. FREEMAN, JR.; LOUIS M. FREEMAN; AND THE LOUISIANA COCA-COLA BOTTLING COMPANY, LIMITED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. In a nonderivative action brought by certain shareholders against a corporation and its officers and directors, should the shareholders, after failing to show good cause, be entitled to pierce the defendants' attorney-client privilege merely by arguing that the privileged communications may be relevant to the plaintiffs' case?

II. When a corporation offers to purchase its own stock pursuant to a voluntary tender offer and discloses that certain directors and officers do not intend to sell their own shares in the corporation and thus that their percentage ownership in the corporation is likely to increase, is it also necessary under the federal securities laws to characterize the voluntary tender offer as an alleged "freeze out" or "squeeze out" of all other shareholders?

LISTS OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the Petitioners: Mary Margaret Ward; Dorothy C. Ward; Jackson P. Ward, III; Lemuel H. Ward; Edna Jo Brinkley; the Estate of Hortense Brinkley; Mildred Brinkley; the Estate of Dargan Cole; and Jane G. Steinert and the Respondents: Succession of Richard W. Freeman; Richard W. Freeman, Jr.; Louis M. Freeman; and The Louisiana Coca-Cola Bottling Company, Limited.*

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* The Louisiana Coca-Cola Bottling Company, Limited is a subsidiary corporation of Coca-Cola Enterprises Inc., an affiliate of The Coca-Cola Company. The following corporations also are subsidiaries of Coca-Cola Enterprises Inc. and therefore are affiliated with The Louisiana Coca-Cola Bottling Company, Limited: BCI Coca-Cola Bottling Company of Los Angeles: Coca-Cola Bottling Company of California; The Coca-Cola Bottling Company of Miami, Inc.; New Memphis Holding Company; Coca-Cola Bottling Company of Michigan; Coca-Cola Bottling Company of New England; The Detroit Bottling Company, Inc.; The Mid-Atlantic Coca-Cola Bottling Company, Inc.; NEG Holding Company, Inc.; New Alabama Holding Company and Wingspread Corporation.

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Respondents.

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RESPONDENTS' JOINT BRIEF IN OPPOSITION

The Respondents, Richard W. Freeman, Jr., Louis M. Freeman, Succession of Richard W. Freeman; (the "Freemans"), and the Louisiana Coca-Cola Bottling Company, Limited ("La Coke"), respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 854 F.2d 780 (1988).

STATEMENT OF THE CASE

A. Disposition in Courts Below

Petitioners' Statement Of The Case incorrectly and incompletely describes the disposition of the proceedings in the Fifth Circuit. This case actually involved numerous issues on appeal, many of which were left for retrial. In addition, the questions presented to this Court address only a fraction of the grounds under which the Fifth Circuit, in a unanimous opinion, vacated the jury verdicts the trial court entered. Finally, the proceedings following the entry of the Fifth Circuit's judgment militate against granting certiorari at this time.

Initially, the Petition mischaracterizes the disposition of this case by the Fifth Circuit as a reversal.[1] Pet. at 2. The opinion below demonstrates that the trial court's judgment was actually reversed in part, vacated in part and then remanded for a new trial.[2] To the extent that Petitioners' claims might survive the Fifth Circuit's specific rulings, Petitioners will be entitled to retry them in proceedings consistent with the appellate opinion. Pet. at 36a.

Petitioners further neglect to mention that the jury verdicts were not vacated solely on the questions they now present to this Court. The trial below was found to be so riddled with error that neither of the two questions presented

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[1] The Petition for Certiorari will hereinafter be cited as "Pet. at ____." For convenience of reference by the Court, Respondents will cite to particular pages of the *Ward* court's opinion below by referring to the page numbers where the opinion is reprinted in the Petition's Appendix, *e.g.*, "Pet. at __ a."

[2] Indeed, the Fifth Circuit specifically upheld the trial court's ruling that Petitioners failed to establish a "crime-fraud" exception to the attorney-client privilege. See Pet. at 23a.

for certiorari could be dispositive of the appeal. For example, many of the attorney-client privileged communications at issue (referred to in the Petition as the "M&L Documents") were produced only pursuant to an improper waiver ruling, which was reversed on appeal and now is left *unchallenged* by Petitioners. Likewise, although the Fifth Circuit invalidated *every* jury charge it addressed, the Petitioners only question those rulings on a single jury charge (the "Squeeze Out Charge"). Even if the Fifth Circuit had erred in holding that the Squeeze Out Charge was erroneous, and it made no mistake given this Court's holding in *Santa Fe Industries, Inc. v. Green,* 430 U.S. 462 (1977), the jury verdict was fatally flawed by numerous other erroneous jury charges. *See, e.g.,* Pet. at 30a. Indeed, the Fifth Circuit did not sustain any of the jury charges before it, but left the remaining charges to be further reviewed by the trial court on remand. Pet. at 36a.

Finally, Petitioners omit pertinent details regarding the proceedings in the Fifth Circuit after the entry of its judgment on September 15, 1988. Petitioners' Suggestion For Rehearing En Banc presented essentially the same questions Petitioners raise in this Court and it was denied without a single Fifth Circuit judge requesting that the court be polled.[3] Pet. at 38a. Petitioners then moved, pursuant to Federal Rule of Appellate Procedure 41, for a stay of the Fifth Circuit's mandate. This motion was likewise denied. *See Magnum Import Co. v. Coty,* 262 U.S. 159, 163 (1923) (in deciding to withhold its mandate, the appellate court "is

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[3] Petitioners did not file a petition for rehearing and the filing of a suggestion for rehearing en banc, as opposed to a petition for rehearing, does not toll the time for filing a petition for a writ of certiorari with the Court. See Federal Rule of Appellate Procedure 35. Thus, although the Fifth Circuit treated the suggestion as a petition for rehearing, the Petition is not even timely.

in a position to judge, first, whether the case is one likely, under our practice, to be taken up by us on certiorari"). Finally, the case has already been scheduled for retrial, beginning on March 2, 1990.

B. Statement Of The Facts

Despite sharp differences with Petitioners' Statement Of The Facts, Respondents will not restate their version of the facts, which were accurately condensed in the opinion below. See Pet. at 8a. The Fifth Circuit's summation highlights the myriad business developments and economic changes facing Respondents in the early years of this decade, including Respondents' efforts to acquire neighboring bottlers, expand into new product lines and combat inflationary and recessionary trends. Although one aspect of La Coke's business restructuring was that La Coke also redeemed much of its own stock over these years, Petitioners' own facts demonstrate that La Coke did not "squeeze out" its shareholders. Instead, La Coke's stock redemptions were pursuant to negotiated transactions with major institutional and individual shareholders or *voluntary* invitations to tender offered to smaller shareholders such as Petitioners. Pet. at 3.

Petitioners fail to identify any alleged misrepresentations or omissions of fact related to the stock redemption offered by La Coke on April 20, 1982 (the "1982 Tender") pursuant to which they sold their stock. The Fifth Circuit had the opportunity to review the 1982 Tender disclosure statement with all of Petitioners' allegations in mind before vacating the trial court's judgment. Rather than point to any omitted or misrepresented facts, Petitioners characterize the evidence in an effort to demonstrate that Respondents should have disclosed an alleged intention to "squeeze" or "freeze" out shareholders and attempt to divert this Court's attention

to the privileged communications and work product of Respondents' counsel—the "M&L Documents." With the benefit of a complete record below, the Fifth Circuit panel unanimously held that the disclosure statement amply described the effect of a successful tender offer and held: "[t]he fraudulent scheme repeatedly referred to by the plaintiffs was not supported by the evidence presented in the district court." Pet. at 23a.

The Fifth Circuit also found that Petitioners' characterizations of the evidence were not borne out by the record before it. Indeed, the Petition demonstrably conflicts with the record below on every important allegation stated by Petitioners. For example, the Freemans were not "the three highest ranking management officials" in La Coke from 1979-1984. Pet. at 3. Richard W. Freeman had ceased managing La Coke by 1982 and William H. Harris, an unrelated nondefendant who testified that he saw nothing wrong with the 1982 Tender, had become La Coke's third ranking officer. Likewise, La Coke did not, as asserted by Petitioners, acquire "approximately 80% of its own stock through three tender offers." Pet. at 3. Much of the stock was redeemed through negotiated transactions with institutional and individual investors which, taken together, held controlling interests in La Coke at the time of the 1982 Tender.[4] *See, e.g.*, Pet. at 6a. Pursuant to these negotiations,

[4] The Petition's Statement of Facts further confuses the 1982 Tender with other, unrelated, stock redemptions. For example, the Pru Capital, Inc. letter referred to in the Petition was written many months after the 1982 Tender. Petitioners inexplicably claim that the 1982 Tender was financed by Pru Capital, Inc. when Pru Capital actually had no dealings with La Coke at the time of the 1982 Tender. Pet. at 5. Pru Capital actually provided refinancing in mid-1983—one year *after* the 1982 Tender—for notes issued in payment of *subsequent* stock redemptions. The

the 80% figure mentioned by Petitioners was actually reached *prior* to the 1983 tender offer and not "[a]s a result" of that offer. Pet. at 5.

Although Petitioners claim they were not informed by Respondents of transactions regarding bottling companies *other* than La Coke, the Fifth Circuit found that many of the Petitioners were well aware of what other bottlers were doing. Pet. at 35a. The Fifth Circuit further found that this information was widely available from numerous public sources, and all of the Petitioners had the opportunity to analyze it before choosing to sell their shares back to La Coke. Pet. at 30a. Similarly, Petitioners profess ignorance of the alleged plan to "squeeze out" minority shareholders, despite the Fifth Circuit's finding that several Petitioners "were advised that defendants 'may be trying to squeeze out the minority shareholders' through a reverse stock split" and "that all of them knew that the Freemans' percentage ownership increased as the plaintiffs cashed out." Pet. at 35a. Indeed, as the Fifth Circuit noted, Respondents *disclosed* this last fact in the 1982 Tender disclosure statement. Pet. at 8a.

Petitioners' conclusory assertion that the Freemans "knew the stock was worth much more than offered" is supported only by inferences derived from the sale of the company several years later. Petitioners contrast the per share price paid for La Coke stock in 1982 and that paid over three years later without first adjusting their figures for the passage of time, minority discounts or the substantial reduction in the number of shares outstanding. *Cf.* Pet. at 3 and Pet. at

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Freemans' correspondence with Pru Capital regarding the financing of stock transactions in 1983 is quite removed from their alleged motives with respect to the 1982 Tender and actually is related to existing facts which had come about by the end of 1982.

7a n.1. Nor do Petitioners take into account any changes in the products or marketplace of La Coke. *Id.*

Petitioners' claim is simply one of "fraud by hindsight." Prior to selling in 1982, Petitioners regularly received an annual report, including audited financial statements, and quarterly reports with quarterly and comparative financial information. Petitioners were fully capable of using these reports to value their illiquid minority shares before they sold. Respondents, on the other hand, stayed with their family business and were not approached by a corporate suitor until several years *after* Petitioners took their own substantial profits out of La Coke. That La Coke's value as a going concern and corporate entity continued to appreciate over this interim period does not imply fraud. The Fifth Circuit had access to the full record regarding this time period, including La Coke's annual reports, which described the dramatic results from the unanticipated introduction of such new products as diet Coke after the 1982 Tender. As the Fifth Circuit recognized, "[a]nyone even casually familiar with the intense competition in most industries in our economy knows, however, that the value of a company can change dramatically in three years—or, for that matter, in three months." Pet. at 15a. In short, Petitioners' characterizations of the facts demonstrate that they believe this Court sits as a court of appellate review to determine whether the Fifth Circuit's factual determinations were correct based on the record below.

REASONS WHY THE PETITION SHOULD BE DENIED

I. FEDERAL LAW SHOULD NOT BE ATTENUATED TO PERMIT PETITIONERS ACCESS TO RESPONDENTS' PRIVILEGED COMMUNICATIONS WITH COUNSEL

Petitioners' discussion of the applicability of *Garner v. Wolfinbarger*, 430 F.2d 1093, (5th Cir. 1970), *cert. denied.*, 401 U.S. 974 (1971), to this case can only be described as schizophrenic. In complete contravention of Supreme Court Rule 17, Petitioners initially invite the Court to second-guess the Fifth Circuit's application of Fifth Circuit precedents to the facts of this case, thus seeking review of an intramural precedent in a fact-specific situation of no national importance. The Petition devotes six pages to arguing that the Fifth Circuit misapplied its *Garner* analysis regarding whether there was "good cause" to relax Respondents' attorney-client privilege. Then, in the last paragraph of their *Garner* argument, Petitioners surprisingly claim that they "are not asking this Court to review a 'good cause' finding". Pet. at 13. Instead, Petitioners suggest that this Court announce some new rule of evidence to compel the production of a corporation's attorney-client privileged documents in all shareholder lawsuits.[5] *Id.* Petitioners' invitation to eviscerate the corporate attorney-client privilege cannot be squared with the prior decisions of this Court or any other

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[5] Petitioners provide the Court with no concrete, authoritively supported guidance to shape this sweeping doctrine. Petitioners merely hint in footnote 6 on page 13 that one could simply compel the production of all relevant privileged documents to any shareholders who sued the corporation. *But see SS Monrosa v. Carbon Black Export*, 359 U.S. 180, 184 (1959) ("Resolution here . . . can await a day when the issue is posed less abstractly.")

federal appellate court. Respondents will address this ultimate request before turning to Petitioners' fact-specific issues.

A. Petitioners' Invitation To Fashion An Entirely New Rule Regarding Corporate Attorney-Client Privileges Conflicts with Federal Law And Sound Policy

Petitioners do not explain why this Court should interfere with the Fifth Circuit's interpretation of its own precedents and obliterate *Garner's* good cause requirement. In arguing for a more expansive reading of *Garner,* Petitioners utterly misconstrue the Fifth Circuit's own stated concern—that *Garner* be applied circumspectly. Pet. at 36a (posing fear that corporate officers will be "less willing to discuss matters openly with the corporation's attorney"). This concern is also reflected in this Court's opinion in *Upjohn Co. v. United States,* 449 U.S. 383 (1981), which recognized the danger of such a widespread erosion of the attorney-client privilege.

In *Upjohn,* this Court reaffirmed the need to preserve the attorney-client privilege in corporate settings, particularly when counsel's advice is necessary for the corporation to navigate the shoals of governmental regulations. *Upjohn,* 449 U.S. at 392 ("In light of the vast and complicated array of regulatory legislation confronting the modern corporations, 'corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law'"). The federal securities laws present only one of many contexts in which corporate directors and officers must seek legal advice regarding complex and interlocking regulations and laws. The *Upjohn* Court found that the privilege served important public policy goals by protecting these exchanges from widespread or random disclosure. 449 U.S. at 389 ("Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote

broader public interests in the observance of law and administration of justice."); *see also Fisher v. United States*, 425 U.S. 391, 403 (1976). Petitioners' novel suggestion that this Court should suddenly abandon these long-standing policies whenever shareholders are litigants is both illogical and unsupportable.

The Fifth Circuit carefully limited any relaxation of the privilege to those corporate settings where a mutuality of interests exists between the corporation and the shareholder, and then only where the shareholder can demonstrate "good cause." Pet. at 12a. Indeed, the *Ward* court emphasized that its decision was "limited to the facts presented in this case." Pet. at 36a. Petitioners apparently would supplant these considered limitations with a sweeping invasion of the corporate attorney-client privilege whenever a shareholder can allege merely that the documents "are relevant to the subject matter of the case." Pet. at 13 n.6. The Fifth Circuit spurned such broad generalizations in *Garner* and again in *Ward. See, e.g.,* Pet. at 15a-16a. The *Upjohn* Court rejected a similar invitation to set hard and fast rules regarding the attorney-client privilege, stating (449 U.S. at 396-97):

> "Needless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas. Any such approach would violate the spirit of Federal Rule of Evidence 501. See S Rep No. 93-1277, p 13 (1974) ('the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis'); *Trammel*, 445 U.S., at 47, 63 L Ed 2d 186, 100 S Ct 906; *United States v. Gillock*, 445 US 360, 367, 63 L Ed 2d 454, 100 S Ct 1185 (1980). While such a 'case-by-case' basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the Rules."

Petitioners' request that the Fifth Circuit's case-by-case inquiry be jettisoned in favor of an expansive uniform rule similarly violates Federal Rule of Evidence 501.

Petitioners' analysis of the *Garner* issue hinges on the erroneous premise that they should receive the M&L Documents merely because they once were shareholders in La Coke and filed a lawsuit. Arguing that the Fifth Circuit misconstrued its own precedent, Petitioners quote out of context from *Garner* the phrase that: "[m]anagement judgment must stand on its merits, not behind an ironclad veil of secrecy which under all circumstances preserve it from being questioned by those for whom it is, at least in part, exercised." Pet. at 10. As the *Ward* court recognized, however, *Garner* goes on to hold that a "corporation is not barred from asserting it [the privilege] merely because those demanding information enjoy the status of stockholders." *Garner*, 430 F.2d at 1103. Contrary to the Petitioners' arguments, a consistent theme of *Garner* and its progeny has been that a corporation's attorney-client privilege is *not* automatically relaxed as to the corporation's shareholders. *In re International Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1239 (5th Cir. 1982). Petitioners' assertion that the Fifth Circuit's rigorous good cause analysis should be disregarded ignores the need to balance the competing interests of a corporation, its management and its shareholders. *Garner*, 430 F.2d at 1101 ("There may be many situations in which the corporate entity or its management, or both, have interests adverse to those of some or all stockholders.").

This case is a prime example of when the privilege should be maintained: when a small group of former shareholders file claims adverse to the corporation. The *Garner* court itself emphasized the validity of the privilege where isolated plaintiffs attempt to take unfair advantage of the corpora-

tion's need for candid legal advice (430 F.2d at 1101 n. 17) (emphasis added):

> "Due regard must be paid to the interests of nonparty stockholders, which may be affected by impinging on the privilege, sometimes injuriously (though not necessarily so—in some situations shareholders who are not plaintiffs may benefit). The corporation is vulnerable to suit by shareholders whose interests or intention may be inconsistent with those of other shareholders, even others constituting a majority."

Following *Garner's* teachings, the *Ward* court distinguished proceedings such as shareholder derivative lawsuits from Petitioners' efforts to assert interests adverse to those of La Coke and its shareholders. Pet. at 14a.

Ironically, Petitioners cite the Ninth Circuit's decision in *Weil v. Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18 (9th Cir. 1981), for their proposition that the privilege "must be narrowly and strictly construed." *Weil*, however, teaches that the privilege *should* apply where the plaintiff is no longer a shareholder and is not asserting a derivative claim. In *Weil*, former shareholders in an investment fund alleged that the defendants had violated the securities law by failing to disclose that the fund's shares had not been registered pursuant to various "Blue Sky" laws. During discovery, the fund invoked the attorney-client privilege with respect to advice given it by outside counsel regarding registration. The Ninth Circuit refused to expand *Garner* to require the production of these privileged communications, stating (647 F.2d at 23):

> "Without passing on the merits of *Garner*, we find it inapposite to the case before us. Weil is not currently a shareholder of the Fund, and her action is not a derivative suit. The *Garner* plaintiffs sought damages from other defendants in behalf of the corporation,

> whereas Weil seeks to recover damages from the corporation for herself and the members of her proposed class. *Garner's* holding and policy rationale simply do not apply here."

The distinctions drawn by the Ninth Circuit, that the plaintiff was no longer a shareholder and that the claims were not derivative, apply with equal force in this case. Indeed, the Fifth Circuit stated "we recognize reason in the *Weil* holding" and incorporated much of the Ninth Circuit's rationale in the decision below. Pet. at 14a.[6] *Weil* reinforces the correctness of the outcome below, demonstrating a consistency among the circuits which undercuts any justification for issuance of a writ of certiorari.

The proposal that shareholders be given access to all "relevant" privileged materials runs counter to the very principles articulated in *Upjohn, Garner* and *Weil*. Recently, in *Shirvani v. Capital Investing Corp.*, 112 F.R.D. 389 (D. Conn. 1986), a court succinctly summarized the most significant arguments leveled against such an indiscriminate relaxation of the attorney-client privilege. In *Shirvani*, the plaintiffs filed a securities lawsuit and sought, under *Garner*, to compel discovery of privileged communications involving the corporation and its former officers. The court, echoing this Court's concerns in *Upjohn*, rejected the plaintiffs' motion (112 F.R.D. at 391) (emphasis added):

> "Although corporate management is expected to act ultimately for the shareholder's benefit, a hasty resort to *Garner* concepts will confuse who corporate counsel's clients realistically are, and ignore the genuine

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[6] Petitioners' irrelevant suggestion that no shareholders were left to file a derivative suit is belied by their own Statement Of Facts, which concedes that Respondents never held all of the outstanding shares of La Coke.

> need of management in the ordinary course for confidential communication and advice . . . Indeed, *a curtailment or confusion of traditional privilege concepts eventually may not lead to more endpoint disclosure at all, but result instead in less open and candid attorney-client communication in the first place.*"

Petitioners do not indicate that any federal appellate court has endorsed their suggestion that former shareholders should have access to all privileged documents which might be "relevant" to their allegations. *See State of Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918 (1950) ("[i]t may be desirable to have different aspects of an issue further illumined by the lower courts" before granting certiorari). This is is not surprising, given that Petitioners' approach would be tantamount to abolishing the corporate attorney-client privilege. Petitioners' diluted privilege should be rejected because it "not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Upjohn*, 449 U.S. at 392.

B. The Fifth Circuit Correctly Applied Its Good Cause Indicia To The Facts Of This Case

Since Petitioners did not bring a derivative suit, the Fifth Circuit noted that their "bona fides" under *Garner* were suspect "and thus more subject to careful scrutiny in determining if good cause for suspending the privilege exists." Pet. at 14a. After applying the *Garner* indicia to the facts of this case on a fully developed record, the Fifth Circuit correctly found that there was no "good cause" to relax the attorney-client privilege. Although they quibble with the way the *Garner* indicia were applied in the opinion below, Petitioners cite to no federal authority which might indicate that the Fifth Circuit misconstrued its own precedent.

The Fifth Circuit found that Petitioners' good cause argument lacked support in the record. Pet. at 16a; *see, e.g., In re Burlington Northern, Inc.*, 822 F.2d 518, 526 (5th Cir. 1987) (holding that lower court had not made "the detailed factual inquiry necessary to support this conclusion"). Petitioners owned less than 4% of La Coke's outstanding shares at the time they sold in 1982 and only represented nine out of fifty-five shareholders of record. *See, e.g., Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21 (N.D. Ill. 1980) (no good cause where plaintiff represented less than 1% of outstanding shares). Nor do Petitioners purport to represent any other former or current shareholders of La Coke.

The Fifth Circuit also found Petitioners' assertion that they made other efforts to obtain the information they sought was belied by the record. Petitioners were perfectly able to depose the directors and officers of La Coke and ask them to explain their motivations for approving the 1982 Tender. *See In re LTV Securities Litigation*, 89 F.R.D. 595, 608 (N.D. Tex. 1981) (availability of traditional discovery precluded any need to relax the privilege under *Garner*). Such common discovery procedures would not have impinged on Respondents' privileged communications with counsel and counsels' own internal memoranda.[7] Respondents' deposition testimony also would have provided much

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[7] This option was unavailable to the *Garner* plaintiffs because the deponents refused to testify, asserting their constitutional privilege against self incrimination. *Garner v. Wolfinbarger*, 56 F.R.D. 499 (S.D. Ala. 1972). Thus, in *Garner*, direct testimony was simply unavailable. No such barrier to the truth-seeking process confronted Petitioners, who admit that "depositions were taken of all the company's directors and officers." Pet. at 9 n.4. In those depositions, La Coke's directors explained the reasons why they voted for the 1982 Tender to the extent Petitioners chose to inquire.

more direct evidence of their beliefs than the hearsay upon hearsay gleaned from the ruminations of La Coke's counsel. *See Hickman v. Taylor*, 329 U.S. 495, 516-517 (1947) (rejecting the propriety of using an attorney's work product as evidence because "the statement would be his language, permeated with his inferences") (Jackson, J., concurring).

Petitioners inexplicably assert that the Fifth Circuit "glossed" over the colorability of their claims when approximately half of the opinion below is devoted to a detailed analysis of Petitioners' fraud allegations. Pet. at 24a-36a. Indeed, the Fifth Circuit invalidated *every* securities fraud jury charge that it addressed and expressed "serious reservations" as to the remaining charges. *Id.* Many of these securities and state law fraud charges also were questioned on the additional ground that the applicable limitations periods had passed. Pet. at 34a-35a. Nor, as Petitioners suggest, did the Fifth Circuit "ignore" Petitioners' fiduciary duty claims. See Pet. at 12 n.5. The appellate court expressly found the fiduciary duty jury instructions were "predicated" on the defective securities fraud allegations. Pet. at 32a n.7. Furthermore, the Fifth Circuit vacated the fiduciary duty verdict on the independent ground that the jury charge conflicted with Louisiana state law. Pet. at 33a-34a. In the end, none of Petitioners' supposedly colorable claims were sustained by the Fifth Circuit and many of the claims were found to be defective on several levels of analysis.

Petitioners cannot simply infer, just because the *Ward* court did not explicitly address the remaining *Garner* good cause indicia listed in its opinion, that the court ignored them. The opinion adequately demonstrates that, given the lack of any mutuality of interest between Petitioners and La Coke, Petitioners could not meet their burden of demonstrating good cause even if they *met* the remaining criteria.

Thus, any further weighing of *Garner* indicia by the appellate court would have been superfluous. Pet. at 16a.

Petitioners' inability to demonstrate, through citations to the record or cases, that proper application of *Garner* would result in their having access to the privileged communications is completely understandable. Holding less than 4% interest in La Coke, representing only a small fraction of the shareholders, having been unable to demonstrate that they could not get the relevant material from non-privileged sources or that they could even identify specifically which privileged materials they sought, the Petitioners cannot find record or legal support for their position.

C. Determining Applicability Of The Crime-Fraud Exception To This Case Calls For A Futile Review Of Two Previous Factual Findings

Petitioners also appear to pose a subsidiary question of whether both lower courts erred in refusing to apply the crime-fraud exception to the attorney-client privilege on the facts of this case. As with the *Garner* argument, Petitioners lack any federal authority indicating either that the trial court abused its discretion or that the Fifth Circuit's findings raised a conflict with the previous holdings of this Court or any other federal circuit. Indeed, it appears that Petitioners raise no question of law at all on this issue, but merely seek a redetermination of the facts. Since Petitioners fail to argue that the trial court's findings of fact constituted an abuse of discretion, however, the crime-fraud question is not even properly before the Court. If anything, the crime-fraud question is less appropriate for consideration on writ of certiorari than is Petitioners' *Garner* argument.[8] See *Mag-*

[8] By raising the crime-fraud exception as an alternative ground for obtaining the M&L Documents, Petitioners overlook several

num Import Co., 262 U.S. at 163 ("The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing.")

Petitioners convey the impression that the Fifth Circuit reversed the trial court by refusing to apply the "crime-fraud" exception to the attorney-client privilege as an alternative to invoking *Garner*. Actually, the Fifth Circuit *affirmed* the trial court on this particular issue (Pet. at 23a):

> "Finally, the plaintiffs urge us to hold that the district judge abused his discretion when he did not find that the crime-fraud exception to the attorney-client privilege applies here. . . . The fraudulent scheme repeatedly referred to by the plaintiffs was not supported by evidence presented to the district court. . . . We find no

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procedural problems. First, Petitioners' failure to raise the crime-fraud exception in the trial court with regard to the M&L Documents produced under the pretrial *Garner* ruling should be construed as a waiver as to most of the documents they seek. Second, a full resolution of this issue would induce this Court to rule on the rights of third parties. An attorney may invoke a personal work product privilege independent of the client's assertion of the privilege. See, *e.g.*, *In re Sealed Case*, 676 F.2d 793, 812 n. 75 (D.C. Cir. 1982). The M&L's attorneys, who were not parties to the litigation below, have the right to reassert their privileges to their opinion work product on appeal. In order to vitiate *M&L's* opinion work product privilege, Petitioners would then have to demonstrate that M&L knowingly furthered a crime. *In re Antitrust Grand Jury*, 805 F.2d 155 (6th Cir. 1986). Petitioners do not suggest that they can demonstrate that M&L attorneys knowingly acted in furtherance of a crime or fraud. Third, Petitioners make no allowances for the extensive *in camera* review of the evidentiary record that would be necesssary if this Court were to go beyond Petitioners' allegations and investigate the substance of Petitioners' alleged *prima facie* case.

> abuse of discretion in the trial judge's disposal of this issue."

Thus, after reviewing the M&L Documents, four judges unanimously have held that their factual examination revealed nothing which would support the claimed crime-fraud exception to the privilege. Petitioners nevertheless ask this Court to sit as yet another court of error and review the record *de novo* to find what both lower courts could not. *But see United States v. Johnson*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Petitioners support their assertion that both lower courts erred by arguing that "the jury concluded that over 100 counts of fraud had been committed." Pet. at 14. Although it is unclear how Petitioners arrived at such a figure, their argument ultimately fails to recognize that the jury's fraud verdict was vacated because "many of the court's charges to the jury described actions which were not violations of securities laws." Pet. at 15a. The Fifth Circuit further stated that it had serious doubts regarding the remaining fraud charges and remanded the charges to the trial court for findings as to whether they, too, were fatally flawed. Pet. at 36a. A vacated jury verdict is a nullity. *Litman v. Massachusetts Mut. Life Ins. Co.*, 825 F.2d 1506, 1513-14 (11 Cir. 1987). Petitioners rely on a fraud verdict that has not only been vacated but also has been vacated because the jury was improperly instructed on the very issue of fraud. Thus, there is no credible evidence that counsel was involved in a crime or fraud.

As previously noted by the Fifth Circuit, Petitioners never do explain just how the M&L Documents establish fraud. Pet. at 23a. Petitioners refer this Court to their Statement Of Facts, which merely asserts that "La Coke consulted M&L for the purpose of squeezing out the other shareholder-

ers". Pet. at 16. *But see Ohio-Sealy Mattress Mfg. Co.*, 90 F.R.D. at 30-31 (reversing magistrate's finding of crime-fraud and holding that attorneys' communications reflecting legal assessment of risks "cannot be read as a confession of guilt"). Yet, Petitioners' belief that, "because there was no corporate purpose for these transactions," the Freemans "ran the risk of legal challenge by the other minority shareholders" is contradicted by the law and the record. Pet. at 5. First, no court has ever required a "corporate purpose" for a tender offer. Indeed, the Delaware court which had invented the business purpose requirement in the limited context of statutory mergers (without ever extending it to other types of transactions) soon reversed itself. *See Weinberger v. UOP, Inc.*, 457 A.2d 701, 715 (Del. 1983) ("business purpose requirement" held to constitute departure from prior law and no longer of any force and effect). Second, the facts show that the 1982 Tender would eliminate the administrative cost of small shareholders, unify ownership and management to reduce conflicts and increase flexibility, increase return on investment, and provide selling shareholders an opportunity to redeploy their assets in investments which were more liquid than privately held La Coke—all proper purposes under the law. Thus, as the Fifth Circuit recognized, the 1982 Tender, even as characterized by Petitioners, was not fraudulent under federal and state law.[9] Pet. at 23a.

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[9] Although Respondents had no need to articulate a business purpose even if La Coke had gone so far as to propose a reverse stock split for a shareholder vote, judicial decisions upholding reverse splits indicate that the same business justifications for the 1982 Tender would have legitimized a reverse split. *See, e.g., Mellman v. Southland Racing Corp.*, 741 F.2d 180, 182 (8th Cir. 1984) (reverse split to eliminate shareholders benefitted company, increased per share earnings, and was "legitimate corporate

The Freemans never denied that they personally felt more comfortable owning more of the company that their forebearers had built and operated, practically singlehandedly, over three generations. Pet. at 45a. They merely wanted to regain family control of their grandfather's corporation in order to have it grow as the family business for the foreseeable future. Petitioners apparently believe that any tender offer or reverse stock split is criminal if it is undertaken for the purpose of eliminating minority shareholders. In affirming the trial court's rejection of this argument on the law and facts of this case, the Fifth Circuit recognized that such corporate practices are prima facie legal and that Petitioners had failed to demonstrate how the 1982 Tender was infected by fraud. Pet. at 23a.

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procedure"); *Teschner v. Chicago Title & Trust Co.*, 59 Ill.2d 452, 322 N.E. 2d 54 (1974), *appeal dismissed*, 422 U.S. 1002 (1975) (interests of minority shareholders can be terminated by reverse stock split of 600:1). The elimination of shareholders in and of itself has been held to be a legitimate business purpose even in the context of freeze out mergers. *Sifferle v. Micom Corp.*, 384 N.W. 2d 503, 509 (Minn. Ct. App. 1986) (freeze out merger to eliminate minority shareholders not a breach of fiduciary duty). Since Respondents never submitted a reverse stock split for a shareholder vote, however, the articulation of a business purpose for such a transaction was a moot point. Respondents correctly decided, as a matter of federal law, to disclose their consideration of the reverse split in the 1982 Tender. *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 12 (1985).

III. IMPOSING A DUTY ON RESPONDENTS TO DISCLOSE AN ALLEGED INTENTION TO "SQUEEZE OUT" OTHER SHAREHOLDERS WOULD SUBVERT OVER A DECADE OF FEDERAL JURISPRUDENCE

In their second question for review, Petitioners admit that they seek disclosure only of the Freemans' *motives*, not facts. Their securities disclosure claim argues that "corporate officials should be obligated to disclose their intent to squeeze out shareholders". Pet. at 18. Petitioners ignore well settled authority following *Santa Fe Industries v. Green*, 430 U.S. 462 (1977), that a director need not disclose his reasons *why* he approved a stock repurchase under federal law because his subjective beliefs cannot be considered a "fact." *See Vaughn v. Teledyne, Inc.*, 628 F.2d 1214, 1220-21 (9th Cir. 1980) (holding that, under *Santa Fe*, defendants need not disclose entrenchment purpose and effect of series of tender offers as a matter of law); *Issen v. GSC Enter. Inc.*, 508 F. Supp. 1278, 1291 n.10 (N.D. Ill. 1981) (reasons for not paying dividends and "going private" motives behind stock repurchases need not be disclosed). The Petition does not refer this Court to any authority which would allow the Squeeze Out Charge to reach a jury. Simply put, the desire to reduce the number of shareholders in a company is not unlawful and need not be disclosed. To now require directors and officers to disclose intentions and motives rather than factual matters would not only subvert the purpose of the federal securities laws as set forth in *Santa Fe*, but also would precipitate a chaotic flood of litigation regarding every disclosure document ever published.

A. The Fifth Circuit Correctly Applied Federal Law In Holding That Respondents Had No Duty To Disclose An Alleged Entrenchment Motive Behind The 1982 Tender

Petitioners misguidedly portray the *Ward* court's holding as a "bright-line approach to materiality" which "clearly conflicts with this Court's decision in *Basic*". Pet. at 15; see *Basic, Inc. v. Levinson,* ____U.S. ____, 108 S. Ct. 978 (1988). Petitioners' misplaced reliance on *Basic* demonstrates that they fail to grasp the distinction between objective facts—which must be disclosed under federal securities laws—as opposed to mere motives. See *Alabama Farm Bureau Mut. Casualty Co. v. American Fidelity Life Ins. Co.,* 606 F.2d 602, 610 (5th Cir. 1979), *cert. denied,* 449 U.S. 820 (1980) (a director is not obligated to disclose his "motives or subjective beliefs"). If there is a bright line test at issue here, the line is not being drawn between "material" and "immaterial" facts, but between "facts" as distinguished from motives and subjective beliefs. As the Fifth Circuit realized (Pet. at 26a):

> "Case law clearly holds that a defendant's motive is not a material "fact." This rule has been discussed at length in cases following the Supreme Court's ruling in *Santa Fe Industries v. Green,* 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977) (holding that breach of a fiduciary duty, absent any element of deception or manipulation, does not state a Rule 10b-5 claim). *See, e.g., Augenstein v. McCormick & Co.,* 581 F. Supp. 452, 457-58 (D. Md. 1984) (surveying cases)."

Despite the Fifth Circuit's express reliance on *Santa Fe* and its progeny, Petitioners relegate their discussion of *Santa Fe* to a footnote. Pet. at 17 n.7. Yet, *Santa Fe* controls this case, and this Court's holding in *Basic* is not even implicated. *Basic* was decided "in the context of preliminary

corporate merger discussions." *Basic,* 108 S. Ct. at 980. Petitioners do not contend that Respondents knew of any such negotiations, or any other material facts, to disclose. Pet. at 31a. Instead, Petitioners characterize Respondents' conduct as a "failure to disclose their intentions, coupled with the use of a fraudulent tender offer." Pet. at 19. Petitioners' complaint that the Respondents failed to disclose that their true purpose behind the 1982 Tender was to entrench certain shareholders, however, "would clearly circumvent the Supreme Court's holding in *Santa Fe.*" *See Beisenbach v. Guenther,* 588 F.2d 400, 402 (3d Cir. 1978) (directors' failure to disclose "the true purpose behind" their activities, *i.e.,* to gain control of corporation, failed to state a claim).

Nor can Petitioners explain how the 1982 Tender was fraudulent. As the Fifth Circuit noted, the mechanics of the tender offer process itself renders the alleged omission of a "squeeze out" motive irrelevant as a matter of law. Pet. at 27a. That a tender offer mathematically increases the proportionate control and earnings of all those shareholders who retain their stock is obvious to anyone with "only an elementary understanding of the stock market." *Vaughn,* 628 F.2d at 1220-21; *Klausner v. Ferro,* 604 F. Supp. 1188, 1196 (E.D.N.Y. 1985), *aff'd,* 788 F.2d 3 (2d Cir. 1986) (corporate stock redemption benefits all shareholders in proportion to the shares held by them).

Notwithstanding the overwhelming federal authority ranged against them, Petitioners point to two appellate decisions which they believe would sustain their claim: *Siebel v. Scott,* 725 F.2d 995 (5th Cir.), *cert. denied,* 467 U.S. 1242 (1984), and *Nelson v. Serwold,* 576 F.2d 1332 (9th Cir. 1978), *cert. denied,* 439 U.S. 970 (1978). Both of these opinions were discussed at length by the Fifth Circuit and distinguished as cases involving the failure to disclose

objective facts, rather than entrenchment motives. Pet. at 28a-29a.

Not only is *Siebel* a Fifth Circuit precedent, but Judge Gee, the author of the opinion below, sat on the panel that decided *Siebel*. As Judge Gee later noted in *Ward*, "[n]owhere in the [*Siebel*] opinion is to be found acceptance of the Ward Parties' proposition asserted here: that a director must disclose an entrenchment motive." Pet. at 28a. If any circuit judge is uniquely equipped to determine whether *Siebel* was, as Petitioners suggest, "indistinguishable [from *Ward*] with respect to the violations involved" it is the one judge who participated in deciding both *Siebel* and *Ward*.

As for the *Nelson* case, Petitioners do not even mention the Ninth Circuit's more recent decision in *Vaughn v. Teledyne*. The Fifth Circuit found *Vaughn* to be factually analogous to Petitioners' claims and quoted from it extensively. Pet. at 27a. The Fifth Circuit followed *Vaughn* rather than *Nelson* after finding that "[t]he Ninth Circuit has distinguished *Nelson* from the duty of corporate officials to disclose their motives for approving a stock redemption program." Pet. at 29a. Thus, the Fifth Circuit expressly harmonized the opinion below with *both* of the cases which Petitioners cite, leaving no conflict for this Court to resolve. *See Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 392-393 (1923) (where circuits "were really in harmony, and not in conflict," then "there was no ground for our allowing the writ of certiorari to add to an already burdened docket.")

This Court is not directed to any misrepresented or omitted fact in the disclosure document at issue, only to allegedly undisclosed intentions. Petitioners are merely attempting to turn back the clock on *Santa Fe* and federalize a host of state law issues. The Freemans had no duty to

proclaim the obvious conclusion that they voted for the 1982 Tender because they wanted shareholders to accept it. *Kas v. Financial Gen. Bankshares, Inc.*, 617 F. Supp. 288, 289-90 (D.D.C. 1985), *aff'd*, 796 F.2d 508 (D.C. Cir. 1986) (insider's presumed scheme to buy up stock in order to "freeze-out" shareholders not illegal and need not be disclosed); *Kademian v. Ladish Co.*, 792 F.2d 614, 623-24 (7th Cir. 1986) (proxy's alleged misrepresentations regarding insider's "true" reason for merger, to maintain control, not actionable as a matter of law). The issue of whether one's personal intentions must be disclosed in this context has been settled for years, and Petitioners pose no reason why an exception should be carved out at this late date for this particular case.

B. Even If Disclosure Of Subjective Motives Was Required, The Omission Of The Alleged "Squeeze Out" Was Not Actionable

An equally important reason for denying certiorari is that the Squeeze Out Charge would have been erroneous even if *Santa Fe* had never been decided. Petitioners' citation to *Basic* is puzzling because they concede that *Basic* adopts for Section 10(b) and Rule 10b-5 actions the objective materiality standard enuciated in *TSC Indus., Inc. v. Northway*, 426 U.S. 438 (1976). *Basic*, 108 S. Ct. at 992-93. In *TSC Industries*, this Court held that, in order for a fact to become material, there must be a "substantial likelihood" that a reasonable shareholder would consider it important in deciding how to vote. 426 U.S. at 448-449. The Squeeze Out Charge cannot survive this threshold test because: 1) the essential facts regarding what Petitioners characterize as a "squeeze out" were disclosed *prior* to the time they sold their stock; 2) characterization of the 1982 Tender as a "squeeze out" would have reinforced, rather than altered, Petitioners' decision to sell out; and 3) Petitioners' admitted

knowledge in 1982 of the alleged "squeeze out" plan affirmatively barred their claims under the statutes of limitations. Thus, the Squeeze Out Charge was erroneous under either *Santa Fe* or *Basic*.

The failure to mischaracterize the 1982 Tender as a "squeeze out" could not possibly have been "fraudulent" because Petitioners were fully aware of the elemental fact that tender offers by their nature eliminate tendering shareholders. Pet. at 27a. In addition, the Fifth Circuit found that "the directors disclosed [in the 1982 Tender] that they did not intend to sell their own shares, and thus their percentage ownership in La Coke would increase." Pet. at 8a. Further characterizing Respondents' objective disclosures with vague hyperbole or inflamatory adjectives such as "squeeze out" or "freeze out" only obscures the disclosure at issue and leads to endless bickering over whether yet other adjectives could have been even more appropriate. Respondents had no "duty to become enmeshed in labeling disclosed information." *Kademian*, 792 F.2d at 626 (quoting *Hundahl v. United Benefit Life Ins. Co.*, 465 F. Supp. 1349, 1364 (N.D. Tex. 1979).

If Petitioners' suspicions that the Freemans planned to "squeeze" them out had been true, additional characterizations would not have been material. See *Biechele v. Cedar Point, Inc.*, 747 F.2d 209 (6th Cir. 1984) (if plaintiffs knew essence of "freeze" agreement, then their decision to tender could not have been affected by the omission of confirming details); *Rice v. Hamilton Oil Corp.*, 658 F. Supp. 446, 448 (D. Colo. 1987) (plaintiffs cannot reasonably claim they were deceived by alleged omissions when they had knowledge of the omitted information). Additional confirmation of Petitioners' claimed suspicions would not have significantly altered the total mix of information already made available to them. *TSC Indus.*, 426 U.S. at 449.

That Petitioners had all this information available to them also rendered their securities fraud claims subject to the applicable statutes of limitations. The trial court had directed a verdict against Respondents' statute of limitation defenses. The Fifth Circuit reversed the ruling after finding that some of Petitioners "were advised that the defendants may be trying to squeeze out minority shareholders" and "that *all* of them knew that the Freemans' percentage interest increased as plaintiffs cashed out." Pet. at 35a. The Fifth Circuit further found that Petitioners had knowledge of "almost all aspects of the fraud alleged" under this charge. *Id.* Thus, on these particular facts, the materiality of the Squeeze Out Charge is a moot issue because it was subject to Respondents' valid affirmative defenses.

A cursory review of the opinion below demonstrates that the Squeeze Out Charge should not have gone to the jury for a variety of reasons unique to this particular record. Even disregarding law long established under *Santa Fe* and all of its progeny, the Squeeze Out Charge was nevertheless erroneous under the materiality standard confirmed in *Basic* as well as barred by the statute of limitations. Issuance of a writ of certiorari under such circumstances would be improvident. See *Southern Power Co. v. North Carolina Public Service*, 263 U.S. 508 (1924); *Furness, Withy & Co. v. Yanz-Tsze, Ins. Assoc.*, 242 U.S. 430 (1917).

III. CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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